Supreme Court, U.S.
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No. 00-646

In the

SUPREME COURT OF THE UNITED STATES

FRANK H. FEICHKO, JR.,

Petitioner,

vs.

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a Delaware corporation, and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORRECTED QUESTIONS PRESENTED FOR REVIEW

Plaintiff's[1] statement of the "Questions Presented" is erroneous. Plaintiff has phrased the issues in relation to factual circumstances that are not true. Plaintiff assumes as fact that his Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* ("FELA"), cause of action was wrongfully removed to federal court in violation of 28 U.S.C. § 1445(a) (2000). Removal was challenged by plaintiff before the District Court and it was determined by the District Court that defendants' removal was proper. However, plaintiff did not complain about that ruling when he appealed to the Tenth Circuit Court of Appeals ("Tenth Circuit"). At no time has it ever been determined that removal was improper.[2] Thus, it is wrong for plaintiff to assume that removal was improper.

Plaintiff also errors in his assumption of facts by suggesting that he never acquiesced to removal. First,

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[1]Petitioner shall be referred to herein as plaintiff, and respondents as defendants.

[2]As explained below, plaintiff also has not petitioned this Court to review the correctness of the ruling that defendants' removal was proper.

plaintiff obviously acquiesced, if not at the time of the removal, when he failed to appeal the ruling denying his motion to remand. Second, his statement that he never acquiesced in the removal when he failed to raise it on appeal begs the question he tries to present. It is undisputable that plaintiff never raised on appeal, and has not raised before this Court, the issue of whether defendants' removal was proper.

Plaintiff also errors by suggesting that he has continually challenged the federal court's subject mater jurisdiction. That is categorically false. Plaintiff never raised subject matter jurisdiction when he moved to remand. He merely argued, despite the fact that he was off-duty and was pursuing only his own objective of looking for his lost checkbook, that he somehow was acting within the scope of his employment so as to come within the provisions of the FELA and make his lawsuit non-removable. The existence of subject matter jurisdiction and the removability of erroneous FELA claims are two separate issues. Plaintiff challenged at the District Court level, but never appealed, only the issue of removability that was decided against him. The Tenth Circuit, on its own, asked the parties to address the issue of subject matter jurisdiction and ultimately held that the District Court indeed had subject matter

jurisdiction.[3] Plaintiff's attempt to raise the issue of no subject matter jurisdiction before this Court is in fact his first and only self-initiated attempt to do so.

Thus, in light of the true facts and status of this case, the questions presented for review by plaintiff simply are whether the Tenth Circuit properly held, *sua sponte*, that the District Court had subject matter jurisdiction over this case, and if so, whether plaintiff in fact waived the issue of improper removal by failing to raise it on appeal. Plaintiff has not sought any review by this Court of the District Court's dismissal of his FELA claims, or any other claims, or the Tenth Circuit's affirmance of those rulings. Significantly, before this Court, plaintiff does not contest the rulings that his FELA claims were *not* viable and were properly dismissed. Therefore, for purposes of plaintiff's petition, this Court is bound by the fact that plaintiff did not have a viable FELA claim, and the questions presented for review must be viewed in light of this undisputable fact.

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[3]As to the separate issue of whether removal was proper, it also held that plaintiff waived the ability to contest the appropriateness of the removal by not raising that ruling on appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, defendants, The Denver & Rio Grande Western Railroad Company ("D&RGW") and Southern Pacific Transportation Company ("Southern Pacific"), no longer exist as corporate entities. Both corporations were subsidiaries of Southern Pacific Railroad Corporation which has been acquired by Union Pacific Railroad Company, a Delaware corporation. Union Pacific Railroad Company is an operating subsidiary of Union Pacific Corporation, a Utah corporation. Union Pacific Corporation is a publicly held corporation.

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CORRECTED AND COMPLETED STATEMENT OF THE CASE

Plaintiff filed his Complaint in state court and alleged three separate causes of action against both defendants. In the first cause of action, plaintiff sought to recover damages pursuant to the Federal Employers' Liability Act ("FELA"). (R., Vol. I, pp. 13-16.) In the second cause of action, plaintiff sought to recover damages pursuant to the Federal Boiler Inspection Act ("FBIA") which only provides a cause of action through the FELA. (*Id.* at 16-17.) In the third cause of action, plaintiff sought to recover damages under a theory of state common-law negligence. (*Id.* at 17-19.) The first and second causes of action were premised on allegations that plaintiff incurred injuries while acting "in the course and scope of his employment." (*Id.* at 13.) The third cause of action was premised on plaintiff's allegations that he was injured while on defendants' property. (*Id.* at 17.)

Plaintiff served defendants with process on November 7, 1995, giving defendants notice of this action. Within 30 days, on December 5, 1995, defendants removed this case to federal court pursuant to 28 U.S.C. §§ 1332(a) and 1441 (2000) (diversity jurisdiction). At that time, defendants acknowledged

the existence of 28 U.S.C. § 1445(a), which bars removal of FELA claims when a plaintiff chooses to file his action in a state court, but explained that that section did not prevent removal here because the plaintiff already had admitted he was not acting within the course of his employment for either defendant at the time he alleged he was injured and therefore did *not* have a viable FELA claim. Conse-quently, because plaintiff had no viable claim under the FELA, Section 1445(a) was not applicable to prevent removal regardless of plaintiff's mere allegations of FELA liability. Defendants also sought removal on the basis of 28 U.S.C. § 1441(c). On December 7, 1995, two days after removal, defendants moved for summary judgment of plaintiff's FELA claims (including the related FBIA claim) and all claims against Southern Pacific. (R., Vol. I, pp. 32-56.)

In response, plaintiff opposed summary judgment and moved to remand. (*Id.* at 63-74.) In his supporting memorandum, plaintiff again admitted he was not on duty, acting within the scope and course of any employment for either defendant, at the time of his alleged injury. He stated in the fact section of his memorandum:

> Plaintiff had worked on January 10, 1993 and had lost his checkbook. He had completed his runs on Sunday, January 10, 1993 and left the locomotives he had been operating, in the yards in Helper, Utah. After he was unsuccessful in finding his checkbook, he went back to the railroad on Monday, January 11, 1993 and discussed the situation with his supervisor, Kurt Jensen. Mr. Jensen, the Road Foreman of Engineers for the Defendant, authorized the Plaintiff to go out into the yard where the locomotive was situated, to search for his checkbook.

(*Id.* at 63-64.) Plaintiff argued that these facts created an issue of fact as to whether plaintiff was on duty, acting under the direction and authority of his supervisor and engaged in activity that benefitted his employer, when he was searching for his lost checkbook on January 11th, his day off. As to the non-FELA claim, plaintiff initially argued that the amount in controversy did not meet the statutory requirement for diversity jurisdiction. Plaintiff quickly retreated from that position and did not contest removal of that claim on the basis of diversity. Defendants replied as to the FELA claims that upon the facts admitted by plaintiff, as a matter of law, plaintiff cannot be found to have been acting within

the course of any employment while pursuing his own personal objectives, not intended to benefit his employer, while he was off duty.

On September 11, 1996, after having fully considered the plaintiff's evidence and concessions regarding his searching for his lost checkbook while off duty, the District Court granted defendants' motion for summary judgment of the FELA claims (and all claims against Southern Pacific) and denied plaintiff's motion to remand. (*Id.* at 89-107.) The District Court stated that since the FELA claims could not stand those "claims for relief could not be remanded." (*Id.*) The District Court also expressly held that "plaintiff's common law negligence claim was properly removed to federal court and it is not subject to remand." (*Id.*)

Thus, the District Court retained jurisdiction on removal, and allowed the case to proceed on the remaining third cause of action, for common law negligence, as to D&RGW. (*Id.* at 105-106.) After years of discovery, in July 1998, plaintiff then filed a motion for partial summary judgment, as to the issue of liability, on his remaining common law cause of action. (*Id.* at 108-121.) D&RGW responded with a cross-motion for *complete* summary judgment. (*Id.* at

122-189.) On August 10, 1998, the District Court entered an Order granting D&RGW's motion and denying plaintiff's motion. (*Id.* at 211-217.) Before a judgment was entered, plaintiff filed a motion for a new trial (although there had been no trial). (*Id.* at 220-240.) On September 1, 1998, the District Court denied that motion and entered a Judgment of Complete Dismissal. (*Id.* at 241-242, 248-250.) Plaintiff then appealed to the Tenth Circuit. (*Id.* at 252-253.)

Plaintiff did not seek to appeal the District Court's decision denying his motion to remand. Plaintiff only contended before the Tenth Circuit that he should be allowed to pursue in the District Court below his FELA claims because he argued once again there is an issue of fact as to whether he was acting within the course of his employment when looking for his lost checkbook the day after he went off duty. The Tenth Circuit rejected that argument and upheld the dismissal of his FELA claims. Plaintiff states in his "Statement of the Case" that the Tenth Circuit "concluded that it did not need to decide whether the District Judge had improperly considered and resolved the merits of Feichko's FELA and BIA claims because Feichko had waived the issue of improper removal by his failure to raise the issue on appeal." (Pet. at 7-8.) That statement is false. The Tenth

Circuit clearly decided that substantive issue appealed by plaintiff, and held that plaintiff's FELA claims were properly dismissed. Plaintiff also challenged on appeal the dismissal of his remaining common law claim, but the Tenth Circuit also rejected plaintiff's argument and upheld that ruling. The Tenth Circuit's holding on these issues are not raised in plaintiff's instant petition for a writ of certiorari. Consequently, defendants will not relate here the record that supports the Tenth Circuit's affirmance of the dismissal of all of plaintiff's causes of action against both defendants.[4]

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[4]As required by Rule 15.2, although not relevant in light of the issues on which plaintiff seeks review by this Court, defendants point out the following additional misstatements of fact made by plaintiff in his "Statement of the Case." Plaintiff was on property owned by D&RGW, not Southern Pacific, and the consist of locomotives that collided with the parked locomotive plaintiff was in while searching for his lost checkbook was operated by D&RGW, not Southern Pacific. D&RGW, not Southern Pacific, was plaintiff's employer. That is one of the reasons why Southern Pacific was completely dismissed from this action. Also, it is not true that plaintiff was called to work at the time he was looking for his lost checkbook and that the Tenth Circuit rejected that fact. Plaintiff had the opportunity to file an affidavit, asserting that fact, in opposition to defendants' initial motion for summary judgment. He did not do so. He admitted he was off duty at that critical time. On appeal, for the first time, plaintiff took an ambiguous statement out of his deposition, that was taken long after the FELA claims were dismissed, to argue that he was on duty. The Tenth Circuit noted that this contention was improperly raised for the first time on appeal and that the cited deposition testimony was ambiguous. The Tenth Circuit declined to depart from its case law and

The Tenth Circuit, *sua sponte*, asked the parties to brief the issues of whether it had subject matter jurisdiction, and if so, whether plaintiff waived his right to challenge the denial of his motion to remand by not raising that issue on appeal. For the first time in this case, plaintiff argued in his supplemental brief that no subject matter jurisdiction existed. The Tenth Circuit rejected that position. The Tenth Circuit also held that plaintiff waived his objection to removal by failing to raise it on appeal. A writ of certiorari is sought only on this limited aspect of the Tenth Circuit's decision. In essence, because he lost on the merits before the federal District Court and Tenth Circuit, plaintiff now wants this Court to allow him to start over in state court, and he has chosen to argue lack of subject matter jurisdiction as the means to get yet another court to rule on the merits of his claims.

REASONS FOR DENYING THE PETITION

I. THE LAW IS UNDISPUTED THAT SUBJECT MATTER JURISDICTION EXISTED BELOW.

Federal courts have subject matter jurisdiction over FELA claims when plaintiffs choose to bring

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consider such newly offered evidence not presented to the District Court below.

them there instead of in state courts. 28 U.S.C. § 1331. The FELA is a federal statute that expressly provides that "an action may be brought in a district court of the United States." 45 U.S.C. § 56. The District Court and Tenth Circuit undeniably had subject matter jurisdiction over all of plaintiff's claims, including the FELA claims, because of federal question jurisdiction (regarding the FELA claims) in addition to diversity jurisdiction (regarding the remaining claim) to which plaintiff admitted. Thus, regardless of whether or not removal procedurally was proper, the federal courts below had subject matter jurisdiction to reject plaintiff's unviable FELA claims and proceed on the remaining claim.

No authority holds that federal courts do not have subject matter jurisdiction to decide the viability of an FELA claim, or that a plaintiff can dictate whether any particular federal court has such subject matter jurisdiction simply by filing a FELA claim in state court and thereafter objecting to its removal. Subject matter jurisdiction is conferred by Congress, and Congress has unequivocally said that all federal district courts "shall have original jurisdiction of all civil actions arising under the . . . . laws . . . of the United States" such as the FELA. 28 U.S.C. § 1331.

There is no conflict among the circuit courts. Indeed there is no question. It is clear cut that federal courts

have subject matter jurisdiction to rule upon FELA claims.

Therefore, there is no reason for this Court to grant plaintiff's petition in order to consider whether the District Court below had subject matter jurisdiction to grant summary judgment against plaintiff on his FELA claims.

II. SECTION 1445(a) ONLY PROVIDES A CHOICE OF FORUM THAT WAS WAIVED BY PLAINTIFF.

Furthermore, plaintiff's initial objection to removal, by filing a motion to remand, has been waived since he did not object to the denial of that motion on appeal. *Cf.* 28 U.S.C. § 1447(c)(provides that procedural defects to removal not timely objected to are waived); *Page v. City of Southfield*, 45 F.3d 128, 132-34 (6th Cir. 1995)(order of remand reversed on appeal where district court remanded *sua sponte* on mere procedural grounds, stating that "[a] plaintiff may forgive the procedural defect and accept the defendant's preference of a federal forum"). In *Carpenter v. Baltimore & O. R.R.*, 109 F.2d 375, 379-80 (6th Cir. 1940), the court stated with respect to the

waivability of a defect arising from the removal of a FELA claim:

> This section [Section 1445(a)] does not purport to limit the jurisdiction of the District Court but confers a personal privilege on the parties which may be waived and the rule applies that where a Federal court would have had jurisdiction of a cause if originally brought there and the parties have fully consented to its jurisdiction after removal and acted thereon, it may retain it, though the cause was improperly removed by the defendant. It is a question of venue and not jurisdiction.

Cf. Patin v. Allied Signal, Inc., 77 F.3d 782 (5th Cir. 1996)(wrongful removal of civil action arising under states' worker's compensation law [see 28 U.S.C. § 1445(c)] is procedural defect that is waivable).

By not contesting on appeal the District Court's denial of remand, plaintiff has waived any objection to removal and the right now to proceed in state court. There is no conflicting authority, and, therefore, no reason to grant plaintiff's petition.

III. THE TENTH CIRCUIT ACTED CONSISTENTLY WITH ALL OTHER COURTS, INCLUDING THIS COURT, IN DETERMINING THAT IT HAD SUBJECT MATTER JURISDICTION AND THAT PLAINTIFF WAIVED HIS OBJECTION TO REMOVAL.

The Tenth Circuit held, with respect to the issues on which a writ of certiorari is sought by plaintiff, that subject matter jurisdiction existed and that plaintiff waived his objection to removal by not raising on appeal the order denying his motion to remand. It is not true that these rulings conflict with any decision of this Court, as argued by plaintiff. They do not conflict with any known case, but as explained above are consistent with existing legal authority.

None of the cases cited by plaintiff hold that federal courts do not have subject matter jurisdiction to reject a deficient federal question (FELA) claim or consider a state law claim when there is diversity jurisdiction. Plaintiff cites *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996). In that case, removal was accomplished at a time when there was no diversity, but diversity occurred before judgment. The Sixth Circuit Court of Appeals vacated the judgment for

lack of subject matter jurisdiction, but this Court reversed, holding that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." 519 U.S. at 64. This Court reasoned that the rules Congress prescribed to preserve a plaintiff's choice of forum was outweighed by "considerations of finality, efficiency, and economy." *Id.* at 75. This case does *not* express a rule of law that the District Court below lacked subject matter jurisdiction to determine that plaintiff had no valid FELA claim.

The *Caterpillar* Court discussed in its analysis two earlier cases which plaintiff also relies on here for his argument of an inconsistency between the Tenth Circuit's decision and the decisions of this Court. They are *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699 (1972) and *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951). The *Grubbs* Court again held, regardless of whether removal was proper, that as long as the district court had jurisdiction, its judgment was valid. 405 U.S. at 700. It also held that an objection to removal raised for the first time on appeal was waived. *Id.* The *Finn* Court adhered to this same principle. In *Finn*, the district court never had subject matter jurisdiction because there never

was diversity; however, in dicta, this Court stated that it agreed with upholding judgments in district courts where removal was improper where

> the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised the case at the time of trial or judgment, the federal court would have cognizance of the case.

341 U.S. at 16-17. Again, these cases do not express a rule of law that the District Court below lacked subject matter jurisdiction to dismiss plaintiff's FELA (federal question) claim and later his state law (diversity) claim. These cases fully support what the Tenth Circuit did in the instant action.

Where plaintiff errors is in his assuming, without any authority whatsoever, that federal courts lack jurisdiction to rule on federal questions when a plaintiff initially chooses to be in state court rather than federal court. Plaintiff believes that statutes

pertaining to forum choices and removal are jurisdictional when they are not. Plaintiff has no authority that conflicts with the authority cited above that holds that a right to chose a state court is not jurisdictional and can be waived. It is not happenstance that 28 U.S.C. § 1445(a), upon which plaintiff relies for his right to choose a state forum, falls outside the section of the code pertaining to jurisdiction (chapter 85). Section 1445 is not a jurisdictional statute. No case holds that it is, and there is no conflict in the case law on this point. Only plaintiff asserts that he alone can grant or restrict the jurisdiction of the federal courts by deciding whether to file his FELA claims in federal or state court.[5]

Regarding the waiver issue, because Section 1445(a) is not jurisdictional there is no reason why plaintiff cannot waive his choice of a state court forum by failing to raise on appeal his objection to the removal to federal court. Plaintiff clearly could have filed his action in the first instance in federal court. Again, there is no conflict with any decisions of this Court, or any other court, with the decision of the

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[5]Interestingly, plaintiff also argues with respect to the waiver issue that "no action by the parties can confer [subject matter] jurisdiction." (Pet. at 18.) Defendants agree that the lack of subject matter jurisdiction cannot be waived by the parties, nor can its existence be abolished by plaintiff's unilateral action as he also asserts out of the other side of his mouth.

Tenth Circuit on this issue of waiver. Indeed, plaintiff even quotes from *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934), for the proposition of law that venue can be waived which is analogous in supporting the legal proposition all other courts have stated that plaintiff's unilateral choice to file a FELA claim in state court also can be waived.

Plaintiff does not deny he failed to object to removal when he appealed to the Tenth Circuit the dismissal of his substantive claims. Thus, his objection to a federal forum was waived. It would not constitute good practice for an appellate court to rule *sua sponte* on a mere issue of removal not deemed important enough by the affected party to raise in his appeal. A party affected by an adverse ruling on a motion to remand below may no longer want to object to the federal court's determination of his claims, especially under circumstances like the instant case where plaintiff was injured about eight years ago, litigation has been ongoing for many years and federal courts are courts of competent jurisdiction to hear his FELA claims. A remand at this late date would assure many more years of litigation and duplication of effort that a reasonable plaintiff may want to avoid. This Court's reasoning in *Caterpiller,* where there also existed subject matter jurisdiction, is instructive.

> In this case . . . no jurisdictional defect lingered through judgment in the District Court. To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

519 U.S. at 77. There is no reason this Court should grant plaintiff's petition in order to consider plaintiff's request to have it throw out clear statutory language and consistent, well reasoned case law and require the parties to do something so unequitable and unfair at this time as to begin all over to relitigate the merits of plaintiff's substantive claims for relief.

IV. THE LAW IS UNDISPUTED THAT THIS CASE WAS PROPERLY REMOVED, EVEN IF PLAINTIFF HAD NOT WAIVED HIS CHOICE OF FORUMS.

Plaintiff had no viable FELA claim as a matter of law. He does not now dispute this ruling made both by the District Court and the Tenth Circuit. Consequently, 28 U.S.C. § 1445(a) had no

applicability. Since Section 1445(a) had no applicability, this case (the remaining non-FELA claim) was properly removed, and the federal courts below properly had diversity jurisdiction over this matter.

Just because plaintiff purported to have a FELA claim does not self impose upon him the ability to keep his action from being removed to federal court. There is precedent for allowing removal of an alleged FELA claim that is not viable because the plaintiff's allegations are not supportable. In *Aldredge v. Baltimore & Ohio R.R.*, 20 F.2d 655 (8th Cir. 1927), *cert. denied*, 275 U.S. 550 (1927), the Eighth Circuit expressly concluded that the federal district court had jurisdiction to determine, in the context of a motion to remand, the question of whether the plaintiff could maintain a claim for relief under the FELA. *Id.* at 657-58. Based upon the undisputed facts before it, and despite the allegations, the court held that the law did not allow plaintiff to maintain the FELA claim, and the court upheld the removal to the federal district court and subsequent dismissal of the FELA claim. *Id.* at 658-61. Interestingly, as in the case at bar, the FELA claim was not maintainable because, as a matter of law, the plaintiff was not on duty. *Id.* at 660. *See also Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95, 98 (7th Cir. 1988), *cert. denied*, 489 U.S.

1032 (1989) (a frivolous or erroneous invocation of a FELA claim does not bar removal).

There also is authority for allowing removal of an alleged FELA claim, despite Section 1445(a), where the FELA allegations are fraudulently made to evade removal. *Yawn v. Southern Ry.*, 591 F.2d 312, 316 (5th Cir. 1979). Allegations inconsistent with facts admitted by plaintiff, as in the case at bar, certainly are fraudulent and only would be made to avoid removal. The fact that plaintiff alleged a state law land-owner liability claim is evidence of plaintiff's knowledge that his FELA claims were not supportable upon the admitted facts of his being off duty when injured. This authority really appears to be no different than the authority previously cited, and the same result is achieved really for the same reason that it would be unjust to allow plaintiff to defeat removal merely by alleging insufficient FELA claims.

In addition, removal was proper, and the denial of plaintiff's motion to remand was appropriate, because of 28 U.S.C. § 1441(c) which also was relied upon by defendants for removal. Since Section 1445(a) does not abolish subject matter jurisdiction over FELA claims but only provides limited immunity from the procedure of removal, such non-removable claims

may be removed when combined with other removable claims. Section 1441(c) expressly provides that non-removable claims may be removed when joined with separate claims that are removable. Plaintiff's non-FELA claim clearly is a separate, independent claim. The District Court found that plaintiff's non-FELA claim "was properly removed to federal court and it is not subject to remand." (R., Vol I, p. 102.) Thus, the District Court also properly could have denied remand of the FELA claims and determined the issues raised therein pursuant to Section 1441(c). *See Dibble v. Grand Trunk W. R.R.*, 699 F. Supp. 123, 126 (E.D. Mich. 1988)(holding and citing authority that Section 1441(c) takes precedence over Section 1445(a) in that it provides flexibility and grants the district court discretion to remand FELA claims when appropriate).

Just because plaintiff "alleged" FELA claims does not render the case absolutely non-removable. Where, as here, plaintiff's own admissions were contrary to his allegations of acting within the course of his employment, his FELA claims could not stand as a matter of law, and without any such claims, Section 1445(a) has no applicability. Thus, this case indeed was properly removed to federal court even in light of that statutory provision.

The Tenth Circuit did not have to decide whether removal was proper because, as discussed above, plaintiff waived his objection to removal by failing to raise it on appeal. However, if it had addressed the substance of this issue, and upheld the District Court's ruling, it would have acted consistently with other circuits who have considered this issue. It would be unjust to now, after the District Court and Tenth Circuit have closely looked at and rejected the merits of plaintiff's federal law claims, to throw all that out and allow plaintiff to have a state court also rule upon the merits just because he alleged his unviable FELA claim in state court rather than federal court *where he also could have brought it*. Federal courts certainly have the ability to determine what claims are and are not viable when deciding whether it has diversity jurisdiction. Therefore, there is no reason to grant plaintiff's petition because it would be improper under the law and equity to grant the relief he seeks.

CONCLUSION

Therefore, for the reasons expressed herein, defendants request that this Court deny plaintiff's petition.

Dated this 21st day of November, 2000.

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